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Hiring Ruled Contractual

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LABOR RELATIONS

HIRING RULED CONTRACTUAL

On December 29, 1988, the California Supreme Court decided *Foley vs. Interactive Data Corp.*, perhaps the most eagerly awaited state supreme court decision in years. The *Foley* ruling, which immediately was hailed as a tremendous victory for California employers, eliminated punitive damage awards for many wrongfully terminated employees. That was the good news for employers.

The decision, however, also provided employers with sobering news. Most significantly, the court ruled that employment relationships essentially are contracts, with terms created by the reasonable expectations of the parties. Thus, the majority of California employees now have a right to sue for breach of contract if terminated without good cause. Although precluded from asking for punitive damages in most instances, these employees can seek loss of income and benefits until comparable employment is found (which, for older workers, may be the rest of their working lives). One such lost benefit could be an employee's fully vested pension.

Emotional Distress Awards May Replace Punitive Damages

Another piece of bad news for employers might be the *Foley* court majority's silence as to whether an employee suing for breach of contract can recover damages for emotional distress. Such damages often are used by juries as a somewhat diluted substitute for punitive damages. Therefore, if this area of damages is allowed in the future, this decision may carry no good news at all for employers. The dissenting justices suggested that recovery for this type of damage would be appropriate.

As the case shows, Daniel Foley could have been any employee with a good work record fired after a conflict with a supervisor.

Foley worked for Interactive Data Corp. (IDC) for almost seven years. During that time, he advanced from an $18,000-a-year assistant product manager to a $56,000-a-year branch manager. After years of receiving commendations and promotions, he was fired for performance reasons two weeks after questioning IDC's hiring of his new supervisor, whom Foley suspected was an embezzler.

Foley brought a lawsuit against the company alleging his discharge violated public policy, breach of his employment contract (unwritten, but implied from the conditions of his job) to discharge only for good cause and breach of the implied covenant of good faith and fair dealing (the unwritten agreement in all employment contracts that the parties will deal fairly with each other).

Before the case went to trial, a judge ruled for the company on all counts, the appellate court agreed and Foley was out of court. Foley took his case to the California Supreme Court. The court ruled that Foley should have the opportunity to present his case. The court stripped Foley (and all employees) of some of the weapons that had been used in the past but sharpened those remaining, thereby changing the battlefield for all future employee lawsuits.

The *Foley* decision clarified several issues concerning California courts for the past decade. The Court decided in 1980 in *Tameny vs. Atlantic Richfield Co.* that discharges in violation of public policy would subject an employer to tort damages. The definition of public policy, however, was left unclear.

In *Pugh vs. See's Candies, Inc.* (1981), the California Court of Appeals held that circumstances of employment could create an implied-in-fact promise to terminate only for cause. The circumstances that would create this enforceable promise were not spelled out.

Another court of appeals case, *Cleary vs. American Airlines, Inc.* (1980), held that an employer may be subject to tort damages when an employee is fired in bad faith, breaching the employment contract's covenant of good faith and fair dealing. Left to be answered was whether the supreme court would uphold this extension of tort remedies.

Citing *Tameny,* Foley alleged that

he was fired for telling his employer about a Federal Bureau of Investigation (FBI) probe of a superior, and this violated public policy (tantamount to being terminated for whistleblowing). The supreme court disagreed. The court ruled that only "substantial public" interests are protected, not private ones.

In answering Foley's contention that he was obligated to report this information, the court held that "Whether or not there is a statutory duty requiring an employee to report information relevant to his employer's interest, we do not find a substantial public policy prohibiting an employer from discharging an employee for performing that duty." The court did not answer the question of whether public policy breaches had to be violations of specific statutes or whether public policy could be found through other sources. Significantly, the court affirmed that even at-will employees can bring a claim of violation of public policy and recover punitive damages.

Employment Circumstances Dictate an Implied Contract

Although the supreme court ruled against Foley on his particular public-policy claim, it drew a roadmap for all future plaintiffs as to which torts would receive the public-policy stamp of approval.

Citing *Pugh,* Foley argued that the circumstances of his employment, including favorable evaluations, raises, promotions and the company's internal personnel policies, proved an implied contract to terminate him only for good cause. The court unanimously agreed. It held that, "the absence of an express written or oral contract term concerning termination of employment does not necessarily indicate that the employment is actually intended by the parties to be 'at will'..."

The court added that the question of whether employment may be terminated at will or only for good cause is to be determined based on evidence, including:

- The employer's personnel policies or practices

- The employee's longevity of service
- The employer's actions or communications reflecting assurances of continued employment
- The practice of the industry.

Thus, Foley now will have a jury determine whether his employment was terminable only for cause, rather than at the will of the employer, and whether that contract was breached.

Citing *Cleary*, Foley argued that his employer violated the covenant of good faith and fair dealing (a technical term for each employer's legal duty to deal with employees in a fair, nonarbitrary manner) by terminating him on a pretext and without reasonable belief that it had good cause (i.e., he was told he was fired for poor performance, but the real reason was because he voiced concern about the investigation of his superior).

Foley contended that he should be able to obtain tort damages as a consequence. The court, by a 4-3 majority, disapproved the *Cleary* line of precedent and held that tort damages no longer were recoverable for a breach of the implied covenant of good faith and fair dealing in the employment relationship. The court held that only traditional contract damages could be obtained, although it refused to discuss what the appropriate measure of damages might be.

Court Decision May Reduce Plaintiff Awards

The supreme court's action in striking down eight years of precedent and disallowing a tort cause of action for breach of the covenant of good faith and fair dealing may go a long way to reduce damages in many wrongful termination suits. Now, many employees will be limited to traditional contract damages. The court majority specifically left open the question of what the appropriate measure of damages would be in such a case.

The fact that punitive and other tort damages no longer are available to the employee who sues for breach of contract (and does not allege public-policy violations or discrimination) should not cause employers to think they are liability free.

The economic damages that can be recovered in some wrongful termination cases can be high, especially if the plaintiff can prove that he or she cannot find employment at a comparable wage scale to the terminated job. Contract damages also may include consequential damages, which in some cases could involve job retraining, relocation and similar expenses.

In addition, as Justice Broussard suggests in his concurrence and dissent, in some cases emotional distress may be

a foreseeable result of the wrongful breach of the employment contract. Thus, damages for emotional distress may be reintroduced to the assemblage of remedies available to the wrongfully terminated employee. Given the court's close (4-3) split on this issue and the recent volatility of the electorate in confirming judicial appointments, it will be interesting to see whether this new precedent will have a longer lifespan than the prior law.

THERE ARE AS MANY DISTINCT AND INDIVIDUAL EMPLOYMENT CONTRACTS AS THERE ARE WORKERS.

Although the court's controversial limitation of plaintiff remedies was the headline grabber, its ruling regarding determination of the nature of the employment relationship was at least of equal importance. The court announced that "the entire relationship of the parties" had to be examined in order to determine whether employment was terminable at will or only for cause.

By placing the employment relationship squarely within contract law, the court assured most terminated employees a sustainable cause of action. Organizations without expressed contracts with employees may find there are as many distinct and individual employment agreements as there are workers (the terms of *each* contract determined by "the entire relationship" between the employer and the individual employee).

Although it is possible to imagine an employer implementing and successfully carrying out an at-will policy with its employees, such doctrines are fragile and can be converted to a cause standard by even an offhand remark. Warnings, progressive discipline, norms in the industry or in the company or oral representations (including unauthorized representations by someone with apparent authority) may be sufficient to take an employment out of the at-will category and invoke a cause standard for termination.

Finally, consider what the court did not decide in *Foley* and what it reaffirmed. First, it reaffirmed a worker's right to recover tort damages for an employer's violation of public policy. Thus, an employee fired because of race or sex, a handicap, union activity, filing a workers' compensation claim or reporting Occupational Safety and Health Administration (OSHA) violations, among others, still will be entitled to recover punitive and other tort damages against the employer.

In addition, only tort damages arising out of the breach of the covenant of good faith and fair dealing specifically were disallowed. Thus, independent torts, such as intentional infliction of emotional distress (often based on the manner of termination) or defamation (giving the fired employee's co-workers or potential employers a false reason for the termination) still would allow the worker to attempt to recover large tort damages.

Although *Foley* indisputably has reduced one of the big ticket exposures of employers to suits by former employees, it also has made the underlying suit — for breach of the employment contract — more likely to reach a jury. Thus, it is not surprising to see recent newspaper reports that *Foley* has caused no reduction in the filing of wrongful discharge cases. ■

The information in this article is not intended to be legal advice.

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